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No. 85-1155 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAPAGO TRIBAL UTILITY AUTHORITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit With A Suggestion Of Summary Disposition

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REPLY BRIEF OF PAPAGO TRIBAL UTILITY AUTHORITY

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Our Petition asserted that the Court of Appeals had affirmed the Federal Energy Regulatory Commission (Commission) on a basis different from that advanced by the Agency and that if our interpretation of the decision below is wrong the Commission's legal rationale (adopted by the Court below) conflicts with decisions of this Court and other courts of appeals. Therefore, irrespective of the proper interpretation of the Court below, summary disposition is appropriate.

The Commission (at 5, fn. 3) and Arizona Public Service Company (APS) (at 5-7) dispute our interpretation of the decision below. They argue that the Court of Appeals affirmed the Commission for the reasons the Agency stated. Thus, assuming that our opponents are correct, the true issue here, as stated by the Commission, is whether "the law requires a utility 'to act in the best interests of its ratepayers in circumstances where those interests conflict with the corporate interests of the utility and its stockholders'. . ." (Commission, at 4-5). This Commission position clearly raises an important question of federal law and represents a complete reversal of existing law.

1. Assuming *arguendo* that our opponents properly interpreted the decision below, it is clear that the Court below decided a federal question in a way which conflicts with controlling decisions of this Court. It is undisputed that the Commission found (App. 30a) "the ratepayers will suffer a substantial loss as a result of the [safe harbor tax sale] transaction." Under our opponents' view of the case, the Court below has held that a utility has an absolute legal right to subordinate the interests of its ratepayers to those of its shareholders. By definition, this principle applies equally to all items of expense or revenue included in a utility's cost-of-service. We cited in our Petition this Court's decisions in *Acker v. U.S.*, 298 U.S. 426 (1936), and *NAACP v. FPC*, 425 U.S. 662 (1976), for the proposition that unnecessarily incurred costs cannot be allowed in rates. Our opponents did not attempt to distinguish these cases nor did they attempt to show how their position here can be reconciled with this Court's applicable decisions.

We also cited *Midwestern Gas Transmission Co.*, 36 FPC 61 (1966), *affirmed sub nom., Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir. 1968), *cert. denied*, 392 U.S. 928 (1968), for the proposition that higher taxes incurred by the voluntary action of a utility which do not constitute a reasonable and prudent business expense must be disallowed as imprudent. As the Commission stated in *Midwestern, supra*, at 71, it has a responsibility "where a cost claimed bears no reasonable, functional relationship to the provision of the service for which the rate is to be charged, to disallow the cost." Under the holding below *any* lawfully incurred cost which benefits shareholders must be allowed as prudent[1] even if it does not benefit and, in fact, harms ratepayers. Our opponents have failed to distinguish either the holding or principle of *Midwestern*. Likewise, our opponents have failed to distinguish either the holding or principles of *El Paso Natural Gas Co. v. FPC*, 281 F.2d 567, 573 (5th Cir. 1960), which holds that a utility has the same duty to reduce its tax expenses for the benefit of ratepayers as it has to make other operating economies.

2. The Commission (at 5, fn. 3) and APS (at 11) argue that the Court below affirmed the Commission for the Agency's stated reason so that *Chenery*[2] is inapplicable. The short answer to this erroneous claim is that the Court below gave as its sole reason for

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[1] This principle is both in conflict with *Midwestern* and a holding that every lawfully incurred cost is *per se* prudent. This plainly exposes the falsity of our opponents' disclaimer of such a *per se* holding by the Court below. Commission (at 4) and APS (at 12-13).

[2] *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

affirming the ALJ's conclusion that APS acted prudently the fact that the transaction was lawful, and it expressly rested its decision on this ground. Thus, the Court stated, at App. 17a:

> Papago is unable to overcome the ALJ's finding that the transaction was not imprudent because one of Congress' major purposes in enacting the safe-harbor leasing provision was to make it perfectly legal for corporations, including APS, to transfer future potential benefits into current income. *See*, "General Explanation of the Economic Recovery Tax Act of 1981," Staff of the Joint Committee on Taxation, at 103 (December 29, 1981), *reprinted in* Internal Revenue Acts, 1980-81, at 1478. We *therefore* decline to disturb the ALJ's exercise of his sound discretion in concluding that APS acted prudently in selling its tax benefits to General Electric. (Last emphasis added.)

3. The Commission (at 4) and APS (at 11-12) argue that the Agency may adopt any of a variety of ratemaking methods "as long as the method selected is not demonstrably at odds with the statutory scheme of regulation" and that the ratepayers "receive the benefits and suffer the burdens of an otherwise *prudent transaction. . .*" (Commission at 4; emphasis added). We have demonstrated that APS was not prudent in engaging in this transaction. Therefore, by allowing the unnecessarily incurred costs attributable to this transaction to be charged to ratepayers, the Commission violated the statutory scheme by failing to protect consumers from exploitation by utilities. *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 758

(1973); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952).

4. The Commission (at 3) and APS (at 7-8) argue that this case is of no continuing importance because the Safe Harbor Leasing statute has been repealed. But, if our opponents correctly interpret the decision below, this case involves a *fundamental* principle of continuing importance in the regulation of utility rates. On the other hand, if we correctly interpret the decision below, this case is *cert* worthy because the Court below has so far departed from the accepted and usual course of judicial proceedings by unsurping an administrative function of the Commission as to invoke this Court's power of supervision in the manner specified by the *Chenery* doctrine.

CONCLUSION

For the foregoing reasons and those presented in our Petition, it is respectfully submitted that PTUA's Petition for Certiorari With a Suggestion of Summary Disposition be granted.

Respectfully submitted,

PAPAGO TRIBAL UTILITY AUTHORITY

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